UNIFORM CIVIL CODE AND ITS NEED

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ABSTRACT

The objective of the present study is to find out the correct relationship between the Fundamental Rights under Part III and Directive principles under Part IV of the Constitution of India. The aim of the work is also to study the state policy towards the reform of personal laws since 1947. The role of judiciary regarding the controversy of Uniform Civil Code and personal laws is also discussed keeping in view the prevailing situation in the country. An in depth study of the subject is need of the day and a suitable legislation is required for solving the problem of Uniform Civil Code.

Keywords: Polygamy, Maintenance, Divorce, Marriage, Personal Law, Religion

Introduction

India is often described as Land of Religious Tolerance. With the establishment of British rule, India came in contact with secular ideas and thoughts of the west. Attempts were made to harmonize western doctrines and concepts with those of India. The liberal and democratic movement of the west strengthened Indian secular trends. Religious freedom of many western countries also considerably influenced Indian thinking. The Constitution of India guarantees freedom of conscience, Freedom to profess, practice and propagate religion, however it is subject to certain limitations imposed by the constitution. The judiciary has made further effort by laying down principle that the constitution protects only the essential aspects of religious freedom. The question of in viability of personal laws was discussed by the Constituent Assembly twice, first when the fundamental rights in Part III relating to personal laws, was incorporated in the Constitution and secondly, at the time when Article 44 contained in Part IV of the Constitution to secure Uniform Civil Code was debated. The Muslim members of the Constituent Assembly vehemently opposed the move but the Constituent Assembly with equal vehemence refused to accept the contention that Muslim Personal Law is immutable and inseparable law in Islamic religion. However, Dr. Ambedkar refused to accept the immutability of the personal laws and held that state could change personal laws as a measure of social welfare and reform.

Debate over Uniform Civil Code

It is stated that for social welfare reason, the state has the authority to enact a law under Article 25(II) and to formulate Uniform Civil Code under Article 44 throughout the territory of India. The Supreme Court judgment of April, 1985 in Shah Bano case[1] is regarded in the country as a landmark judgment with respect to Uniform Civil Code in India. In Shah Bano case, the Court directed the government of India to look into the desirability of enacting a Uniform Civil Code throughout the territory of India.

The uniform civil code is urgently required in the country because there is diversity of personal laws among the various faiths of the country. The state has not adopted a consistent policy with regard to the reform of religious personal laws. Hindu Personal law has been extensively reformed in order to give equal legal rights to Hindu women. The Personal laws of other (minority) communities have been left virtually untouched, ostensibly because the leaders of

[1] Mohd. Ahmad Khan vs. Shah Bano Begum [1985 SCC 556]

these communities claim that their religious laws are inviolable and also because there is said to be no demand for change from within their communities. The present situation is that the women of minority communities continue to have unequal legal rights. The debate about religious personal laws has until now concentrated on their religious nature and on the capacity of the secular state to change them. This is partly because the state has neither rejected nor totally expected the claims about the inviolable nature of religious personal laws. The Constitution is ambiguous about the nature of religious personal laws. It is indicated by the fact that the arguments in favor of their reform as well as those against any reform are both based on the provisions of the Constitution. The state claims the right to reform these laws in order to bring them into conformity with the Constitution by giving women equality. The opposition to reform is based on the Constitutional right to freedom of conscience guaranteed as a Fundamental Right by Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws. The Constitution does not resolve the difficult questions as to whether the religious nature of these laws prevents a secular state from interfering with them or whether the personal nature of these laws as distinct from territorial laws makes them immune to state control. Such ambiguity in the Constitution permits contradictory claims and permits the claims to act discrepantly with respect to essentially similar claims of different communities.

Uniform Civil Code: Judicial Approach

The Directive Principles of State Policy detailed in Articles 3 7 to 51 of the Constitution possesses 2characteristics. Firstly, they are not enforceable in any court and therefore if a directive is infringed, no remedy is available to the aggrieved party by judicial proceedings. Secondly, they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. In this paper, an endeavor has been made to discuss the constitutional obligation of the state to secure for citizens a Uniform Civil Code - throughout the territory of India and Judicial approach in this regard.

A. Narasu Appa Mali case

The first case was **State of Bombay vs. Narasu Appa Mali**[2], where the legislative provisions modifying the old Hindu law were challenged on the ground of being violative of Articles 14, 15 and 25 of the Constitution, the Bombay High Court held that the Bombay Prevention of

[2] AIR 1952 BOM 84

Hindu Bigamous Marriages Act, 1946 was intra vires to the Constitution. The Act had imposed severe penalties on a Hindu for contracting a bigamous marriage. The validity of this Act was attacked on the ground that it violated the freedom of religion guaranteed by Article 25 and permitted classification on religious grounds only, forbidden by Articles 14 and 15.

It was argued that among the Hindus the institution of marriage is a sacrament and that marriage is a part of Hindu religion which is regulated by what is laid down by Shastras. It was also argued that a Hindu marries not only for his association with his mate but in order to perpetuate his family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having a son when he is dead and to the spirits of his ancestors and that there is no heavenly region for a sonless man. The institution of polygamy was justified as a necessity of a Hindu obtaining a son for the sake of religious efficacy. Because son has a unique position in Hindu society no other religious system has given a such position to a son.. The above arguments were rejected by the court. Gajendra Gadkar, J was not prepared to concede that legislative interference with the provisions as to marriage constituted an infringement of Hindu religion or religious practice he was of the opinion that a sonless man can obtain a son not only by a second marriage but by adoption.

Chagla C.J., while upholding the validity of the Bombay Act[3], cited three reasons, firstly, what the state protected was religious faith and belief, but not all religious practices. Secondly, he claimed that polygamy was not integral part of Hindu religion. Finally, if the state of Bombay compels Hindus to became monogamist, and if it is a measure of social reform then the state is empowered to legislate with regard to social reform under Article 25(2) (b), notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate his religion. Regarding the discrimination made by the Act on religious grounds it was contended that only the Hindu community was chosen for the purpose of legislation while Muslims were allowed to practice polygamy. Gajendra Gadkar J. thought that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provision of constitution contained in Article 14. Chagla C.J. also considered that :

"Article 14 does not lay down any legislation that the state may embark upon must necessarily be of and all embracing character. The state may rightly decide to bring about social reform by stages, and the stages may be territorial or they may be community wise, and that the

[3] Bombay Prevention of Hindu Bigamous Marriages Act, 1946

discrimination made by the Act between the Hindus and the Muslims does not offend the equality provision of the Constitution.

Thus, the court took the position that in a democracy it is the Legislature which is to lay down the policy of the state and to determine what legislation to put up on the statute book for the advancement of the welfare of the state. Moreover, the next inference which can be drawn is that the state way rightly decide to bring about social change by stages and these stages may be territorial or community wise.

B. Shah Bano Case

The next important case relating to Muslim Personal Law and Uniform Civil Code is **Mohd. Ahmad Khan vs. Shah Bano Begum**[4]**.** The appellant, Mohd. Ahmad Khan, being an advocate by profession at Indore, M.P. married to respondent in 1932. In 1975 the appellant broke the matrimonial home by driving Shah Bano Begum out of matrimonial home. During this period the respondent gave birth to three sons and two daughters. In 1978 the respondent filed a suit under section 125 Cr.P.C. in the court of judicial magistrate 1st class, Indore, asking for the maintenance provision at the rate of Rs. 500/- per month. On November 6,1978, the appellant divorced the respondent exercising the so called unilateral power of talaaq irrevocabily. In his defence the appellant advanced the argument that by virtue of talaaq, she seized to be his wife, he was no more under obligation to maintain her and he had already paid maintenance to her at the rate of Rs.200/- per month for about two years. He deposited Rs. 3000/- in the court in lieu of dower during the period of iddat. In August 1979, the lower court directed the appellant to pay a sum of Rs.25 per month by way of maintenance. The respondent went in appeal to the Madhya Pradesh High Court in 1980 for the enhancement of maintenance amount. The High Court enhanced the maintenance amount to Rs. 179 .20 per month. Against this order the husband approached the highest judicial institution through special leave.

A Bench consisting of Mr. Justice Murtaza Fazle Ali and Mr. Justice A. Vardharajan were of the opinion that these two cases were not correctly decided, hence they referred this appeal to a larger Bench on Feb. 3, 1981 stating that :

"As this case involves substantial questions of law of far reaching consequences, we feel that

[4] [1985 SCC 556]

the decisions of this court in **Bai Tahira vs. Ali Hussain fissoly Chotia**[5] and **Fazlun Bi vs. K. Khader Vali**[6] require reconsideration because, in our opinion they are not only in direct contravention of the plain and the ambiguous language of section 127 (2) (b) of the Code of Criminal Procedure 1973 . The decisions also appear to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of Muslim Personal Law (Shariat) Application Act, 1937 – An Act which was not noticed by the aforesaid decision. We, therefore, direct that the matter may be placed before the honourable Chief Justice for being heard by a larger Bench consisting of more than three judges."

A Constitution Bench consisting of five judges (Chandrachud, C.J., D.A. Desai, J.O., Chenappa Reddy, J.L.S., Venkat Ramiah, J. and Rangnath Mishra J.) heard the case, Chief Justice Chandrachud wrote and delivered the judgment. The question of maintenance of Muslim divorcee and the applicability of section 125 of Cr.P.C. was settled by the Supreme Court in Bai Tahira[7] and Fuzlin Bi case[8].

In Shah Bano case[9] apart from observations relating to the maintenance of Muslim divorcee the Supreme Court held that

(i) There is no conflict between provisions of Section 125 of Criminal Procedure Code and Muslim Personal Law in the matter of maintenance of divorcee, however, in case of any conflict section 125 shall prevail over the Personal Law.

(ii) That a Muslim divorcee has a right to obtain maintenance till her remarriage or death under section 125 of the code and if she is unable to maintain herself, her ex-husband has a duty to provide for her maintenance till her remarriage or death.

(iii) That if a husband, even he be a Muslim, marries another women the wife has a right to refuse to live with him and yet obtain maintenance from him.

(iv) Moreover, the Supreme Court has strongly criticized the Government of India for its reluctance to enact Uniform Civil Code in view of the sensitivity of the Muslim community. Regarding the implementation of Article 44 of the Constitution, the Court pointed out the

[5] 1979 AIR 362, 1979 SCR (2) 75
[6] AIR 1980 SC 1730, (1980) 4 SCC 125
[7] ibid
[8] ibid
[9] ibid

apathy of the Legislature that it has not been sincere enough to bring the Uniform Civil Code into practice. The court further remarked that the government's in action has rendered the directive contained in Article 44 of the Constitution of India meaningless and asked the government to take steps for enacting a Uniform Civil Code without any regard to the Muslim reaction.

The court held that :"The provision contained in Section 127 (3) (b) may have been introduced because of the misconception that dower is an amount payable on divorce. But that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce."

C. Jorden Diengdeh Case

The third important case relating to the present discussion is **Jorden Diengdeh vs. S.S. Chopra**[10]**.** The special leave petition in Jorden Diengdeh case, relating to Christian personal law, was decided by a division bench of the Supreme Court on I0th May, 1985. The judgement was delivered by Justice O. Chinappa Reddy who sat also on Shah Bano Bench. The facts of the case are somewhat novel and peculiar. The wife, the petitioner claims to belong to the 'Khasi tribe' of Meghalaya who was born and brought up as a Presbytarian Christian at Shillong. She is now a member of the Indian Foreign Service. The husband is a Sikh. They were married under the Christian Marriage Act, 1872. The marriage was performed on October 14, 1975. A petition for declaration of nullity of marriage or judicial separation was filed in 1980 under Sections 19, 20 and 22 of the Indian Divorce Act, 1869. The prayer for declaration of nullity of marriage was rejected by a learned single judge. The wife filed petition for special leave to appeal against the judgment of High Court. She sought a declaration of nullity of marriage under the Indian Divorce Act, 1969, as the marriage was solemnized by Christian rites under the Christian Marriage Act, 1872. The ground on which the declaration was sought in the courts below and before the Supreme Court the ground was the impotence of the husband in that though the husband was capable of achieving erection and, penetration, he ejaculate pre-maturely before the wife has an orgasm, leaving the wife totally unsatisfied and frustrated.

The real problem before the court was that the marriage appeared to have broken down irretrievably. Finding that it was not possible for the court to give the desired relief under the

[10] 1985 AIR 935, 1985 SCR supl. (1) 704

Christian law, the learned judge talked of the urgent need to enact a 'Uniform Civil Code'. He reproduced the ground of divorce and nullity under various statutes (Indian Divorce Act, 1869; Parsi Marriage and Divorce Act, 1936; Dissolution of Muslim Marriages Act, 1939; Special Marriage Act, 1954; Hindu Marriage Act, 1955) and concluded :

"It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is, far from being uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion and caste ... We suggest that the time has come for the intervention of the Legislature in these matters to provide for a Uniform Code of marriage and Divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such actions as they may deem fit to take."

The Justice O. Chinappa Reddy held that under strict Hanafi law, there was no provision enabling a Muslim women to obtain a decree dissolving her marriage on the failure of her husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing 'unspeakable misery in innumerable Muslim women' that was responsible for the passing of Dissolution of Muslim Marriages Act, 1939.

D. Sarla Mudgal Case

The fourth important case relating to personal laws of Hindus and Muslims and Uniform Civil Code is **Sarla Mudgal vs. Union of India**[11] The issue raised before the court were as follows:

(i) Article 44 is based on the concept that there is no necessary connection between religion and personal laws in a 'civilized society'.

(ii) Article 25 guarantees religious, freedom whereas article 44 seems to divest religion from social relations and personal law. Marriage, succession and like matters of secular character cannot be brought within the guarantees enshrined under Articles 25, 26 and 27.

(iii) Article 44 is decisive step towards national integration.

Justice Kuldeep Singh observed :

"The personal laws of the Hindus, such as relating to marriage, succession and the like have

[11] 1995 AIR 1531, 1995 SCC (3) 635

all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of national unity and integration, some other communities would not though, the Constitution enjoins the establishment of a 'Common Civil Code' for the whole of India."

E. Ahmedabad Women Action Group Case[12]

After the judgement in Sarla Mudgal's case yet another verdict in the form of ratio decidendi came in 1997 and some significant issues about the Muslim Personal law were raised by the petitioners in this case. A petition was filed, as a public interest litigation, which the Supreme Court disposed off with other two petitions filed by Lok Sevak Sang and Young Women Christian Association, raising similar questions about laws applicable to Hindus and Christians, respectively. The petition, as regards the Muslim Personal Law urged upon the court : (A) To declare Muslim Personal Law which allows polygamy as void as offending articles 14 and 15 of the Constitution.

(B) To declare Muslim Personal Law which enables a Muslim male to give unilateral talaq to his wife without her consent and without resort to judicial process of courts, as void, offending articles 13, 14 and 15 of the Constitution;

(C) To declare that the mere fact that a Muslim husband takes more than one wife is an act of 'cruelty' within the meaning of clause VIII(f) of Section 2 of the Dissolution of Muslim Marriages Act 1939;

(D) To declare that the Muslim Women (Protection of Rights on divorce) Act, as void as infringing Articles 14 and 15; and

(E) To declare the provisions of 'Sunni and Shia laws of inheritance which provide for lesser share for females as compared to the shares of males, void as discriminating against female only on the ground of sex.

The other two petitions prayed for similar relief regarding Sections 2(2), 5(ii) and (ii), 6 and explanation to Section 30 of the Hindu Succession Act, 1956; Section 2 of the Hindu Marriage Act, 1955; Sections 3(2), 6 and 9 of the Hindu Minority and Guardianship Act, 1956 read with Section 6 of the Guardians and Wards Act, 1890, Hindu spouses unfettered right to make testamentary disposition; Sections 10 and 34 of the Indian Divorce Act, 1869 and sections

[12] AWAG and Ors vs Union of India, AIR 1997 SC 3614

43 to 46 of the Indian Succession Act.

The court did not dispose off any of the petition on merits because these issue involved state policies and, according to the court, they are best dealt by with the Legislature. The court, in this case, realizing the complexities involved in the issue raised before it and also knowing full its powers and limitations, refused to oblige the petitioners by observing, at the outset that : "These writ petition do not deserve disposal on merits in as much as the arguments advanced by the senior advocate before us wholly involved issues of state policies with which the court will not ordinarily have any concern. The court supported its judgment in this case on the basis of its observations in earlier decisions, where the court had held that "The remedy lies somewhere else and not by knocking at the doors of the court. The court quoted a number of significant judgments where similar issues came before it for adjudication. One such earlier petition was **Maharishi Avadhesh vs. Union of India**[13]. In this case the Supreme Court of India dismissed a writ petition under article 32 of the Constitution. The relief prayed in this case were as follows :

(a) to issue a writ of mandamous to respondent to consider the question of enacting a common civil code for all citizens of India;

(b) to declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15, and Articles 44, 38, 39 and 39A of the Constitution of India; and

(c) to direct the respondents not to enact Shariat Act, 1937 in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

The court dismissed the petition saying that "These are all matters for Legislature. The court cannot legislate in these matters. The court had, for the same reasons in **Reynold Rajmani Vs. Union of India**[14], refused to add any new grounds of divorce, like divorce by mutual consent, to those already specified in the Indian Divorce Act. It was emphasized that the court can give the fullest amplitude of meaning to the existing provisions, but cannot extent or enlarge legislative policy hy adding a provision to the statute which was never enacted there. The court further emphasized the previously established trends in different cases explaining the fact that making law or amendment to a law is a slow process and the

[13] 1994 SCC, Supl. (1) 713
[14] 1982 AIR 1261, 1983 SCR (1) 32

Legislature attempts to remedy where the need is felt more acute. It would be inexpedient and incorrect to think that all laws have to be make uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stges." In this case validity of Sections 15, 16, 17, 29 (5) and 144 of the A.P. Charitable Hindu Religious and Endowments Act, 1987 were challenged. One of the questions before the court was whether it is necessary that the Legislature should make law uniformly applicable to all religious or charitable or public institutions and endowments established and maintained by people professing all religions. The court said :

"A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counterproductive to unity and integrity of the nation. Making law or amendment to a law is a slow process and the legislative attempts to remedy where the need is felt most acute. It would, therefore be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go."

The judgment of the apex court is a welcome decision and it should be appreciated because it shows the commitment of the judiciary to the doctrine of Separation of Power which is the backbone of any modern democratic state.

F. Shayara Bano case[15]

The case is more popularly known as The Triple talaq case which invalidated the practice of instant talaq through the 3:2 majority. In this case Shayra Bano along with four women who were victims of triple talaq moved to Supreme Court and challenged the heinous practice of triple talaq. In this case the Supreme court bench ruled out the practice of triple talaq in 2017 and declared it illegal . The bench comprised of judges of five different religions and court held triple talaq, halala and polygamy to be illegal through 3:2 majority and held that all these practices violate the fundamental rights provided under Article 14, 15 and 21 of the Constitution of India. This case paved the way towards Uniform Civil Code in India as triple talaq violated the rights of Muslim women and they were not treated at par with women of other religions.

Conclusion

No Article of Directive Principles of State Policy has attracted so much controversy as

[15] Shayara Bano vs Union of India and ors. (2017) 9 SCC 1

Uniform Civil Code under Article 44 has done. Through different judicial decisions, the Judiciary has supported Uniform Civil Code and tried to narrow down the gap between general provisions of law and the personal law. Now it is the time for the legislature to take initiative in this direction. Though Judiciary has always favored Uniform Civil Code but still there is a long way to go so as for smooth acceptance and then functioning of Uniform Civil Code in India where religion is highly sensitive subject. Therefore, the need of the hour is that a suitable legislation regarding marriage, divorce, inheritance, adoption etc. may be passed governing uniformity among all the religious faiths of the country.